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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 444

EDWARD V. DUNPHY AND ANNABELLE E. DUNPHY,

Petitioners,

vs.

GEORGE N. GRAHAM, JUDGE, COURT OF COMMON PLEAS, STARK COUNTY, OHIO, THE OHIO EDISON CO., YOUNGSTOWN, OHIO, AND THE RAVENNA REALTY CO., MEYERS LAKE, CANTON, OHIO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Your petitioners, Edward V. Dunphy and Annabelle E. Dunphy, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, in the cause entitled State of Ohio, on relation of Edward V. Dunphy and Annabelle E. Dunphy vs. George N. Graham, et al. being case No. 30532, decided upon May 8, 1946 in said court on the question whether said judgment did not in fact deprive and deny these Petitioners of natural justice without due process of law.

Statement of Jurisdiction

This petition for a Writ of Certiorari is filed within three months of the time when said judgment became final and there is presented herewith a certified copy of the entire record and proceedings, including those in the Supreme Court of Ohio.

Summary and Short Statement of Facts

This is an action originally brought in the Common Pleas Court of Stark County, Ohio by Edward V. Dunphy and Annabelle E. Dunphy the Plaintiffs in cause No. 85623 therein, against The Ravenna Realty Co. and The Ohio Edison Co. to quiet title to certain real estate purchased from Robert and Beatrice Kling, the immediately prior possessors thereof for valuable consideration and in good faith, and acquired by Petitioners under a Quit Claim deed of conveyance from said prior possessors. The Ravenna Realty Co. and The Ohio Edison Co. claimed to own title to the said soil and land beneath Petitioners' dwelling house by reason of a paper chain of title tracing directly to a sham patent deed allegedly issued by the United States for lands never acquired by said the United States.

The trial of said cause was held before George N. Graham, Judge of the Common Pleas Court of Stark County, Ohio.

Upon said trial, Plaintiffs offered in evidence certified copies of every pertinent instrument of public record purporting to affect the title and ownership of said lands, upon which Respondents (Defendants therein), predicated their false claim of ownership and title.

These were shown upon their face in each case to be fraudulent representations of that which they were not, being only licenses for limited terms, or outright frauds in that they contained reservations, exclusions, restrictions,

or exceptions which entirely and completely nullified the effect and prima facie psuedo-purport thereof; inclusive of the alleged deed of patent from the United States, the same being issued under the signature of Calvin Coolidge, President, as and for a patent which was intended to have been issued in 1811, and upon or before which date, the United States had neither acquired nor been granted the title or ownership of said lands, and in respect to which, said the United States has never subsequently enlarged its purely fictitious ownership thereof.

In addition thereto, Plaintiffs and their several witnesses gave testimony they had not acknowledged nor in any other manner subserved themselves to the false claims of ownership of Respondents, either by paying the "ground" rentals demanded, or by contracting with Respondents, or otherwise; and that in purchasing their dwelling house, they did receive exactly that which was owned by their occupying predecessors before them, and greater than which Respondents and their predecessors can have no right.

Having fully proven their case at said trial, Plaintiffs rested and Respondents did thereupon successfully move said court for judgment for Plaintiffs' failure to prove their case, and thus denied them their privilege to the full use and occupance of the improvement which they had purchased, in favor of the invalid, fraudulent, and usurped claims of Respondents and all their predecessors.

Further adding to this iniquitous act, the said George N. Graham presumed to act where even the government which empowered him could not act, by surpassing his reasonable and given prerogatives, and usurping the powers of natural justice by restraining Plaintiffs from excavating to enlarge the basement beneath their dwelling.

Plaintiffs thereupon moved the court for judgment notwithstanding its decree by virtue of the mandatory provi-

sions of Sec. 11601, Ohio General Code, which provides: "Where upon the evidence a party is entitled to judgment, the court SHALL so render."

Nevertheless, said George N. Graham did thereupon fail and refuse to rectify or amend his false position.

Plaintiffs thereafter brought their action in mandamus against George N. Graham, Judge, The Ravenna Realty Co., and The Ohio Edison Co. to require said George N. Graham to perform his duty and fulfill the written law before the Supreme Court for the State of Ohio.

Plaintiffs petition before said court set forth all the matters above, and Respondents filed their demurrer thereto which was sustained and Plaintiffs were granted leave to further plead according to law.

Plaintiffs then filed their amended petition to the same effect as above, but clearly and substantially alleged therein each and every essential formal element required to make their pleading good.

Respondents then each filed their respective motions for judgment on the pleadings after the time had expired for making answer. Their several motions were based upon the illogical theory that inasmuch as no essential difference in substance between Plaintiffs first and second petitions existed, the court's ruling on the first demurrer filed should operate as a binding precedent regarding the outcome of Respondents motion for judgment.

This was done after answer day had passed, and the court sustained Respondents' position despite Respondents failure to oppose Petitioners' allegations, and despite Petitioners own motion for judgment made in opposition thereto to call the court's attention to these facts.

In the opinion rendered by the Supreme Court of Ohio, which appears in the record hereto attached, the Supreme

Court treated Respondents' said motion as a demurrer and disposed of all the questions involved in the case, contrary to the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

The questions presented to the court in this case, concisely stated, are these:

1. What is the nature of man's rights in the soil?

2. Is man entitled to the use and enjoyment of improvements he lawfully places upon or makes unto the soil by the toil of his hands?

3. Can one man who has lawfully purchased the improvement of another be divested of his full use and enjoyment thereof by a third person whose claim is fictitious, fraudulent, void, and unproven?

Reasons Relied On for Allowance of Writ

Your Petitioners respectfully show that this is a case of great importance by reason of the fact it raises and tests the question whether in this United States natural justice shall be made to prevail in the manner it was first directed to be done by God.

It is respectfully submitted by your Petitioners that it is necessary for this honorable court to settle the questions set forth above to give effect to the constitutional guarantee that no man shall be deprived of property without due process of law.

Wherefore, your Petitioners request this court that a Writ of Certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of

Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

EDWARD V. DUNPHY AND
ANNABELLE E. DUNPHY,
Pro Se.

B. Reference to Opinion Below

I

Opinion of Canton Municipal Court, Stark County, Ohio under case No. 87668 in an action in forcible entry and detainer which first deprived petitioners of rights and property without due process of law:

> "This cause came on for hearing upon the petition of the Plaintiff stipulations of counsel, defendant's answer and demurrer, the evidence and arguments of counsel, both parties being represented by counsel, and neither party having demanded a jury the case was tried to the Court.
>
> "The court being fully advised finds the allegations of the complaint to be true and advise that due notice was given to the defendants to leave the premises more than three days before the beginning of this action, by plaintiff's agent, Carl Sinclair.
>
> "The Court further finds; (1) the premises occupied by defendants, known as Cottage No. 58, Meyers Lake Village is the property of defendants, no evidence appearing of record to the contrary; (2) that said cottage is personal property and no part of the realty upon which it is situated and into which its foundations are built; (3) that this situation prevails by custom despite defendants payment of taxes upon forms prescribed for payment of real estate only, and not for personal property, and despite the fact defendants believed themselves to be purchasing a fee simple

title to real estate and despite plaintiff's inability to identify the said cottage either by description, or location appended to plaintiff's deed allegedly conveying said real estate, herein, and introduced on behalf of plaintiff.

"It is therefore ordered and decreed that the plaintiff be and it is hereby given judgment against the defendants for restitution of the premises described in the petition herein and for its costs of suit; and that a writ of restitution herein is hereby granted to which the defendants except."

(signed) Paul Van Nostran, Judge.

Fol. 5 (5).

II

Opinion of George N. Graham, Judge of the Stark County Common Pleas Court under case No. 85623 in said court which next deprived petitioners of rights and property without due process of law:

"The two above named causes having heretofore been consolidated came on for hearing and were submitted to the court upon the statements and arguments of counsel and the testimony of sundry witnesses.

The court being duly informed finds that the said Edward V. Dunphy and Annabelle E. Dunphy are not owners in fee of the land in question as alleged by them and have no interest in or right of possession to said land. The court further finds that said Edward V. Dunphy and Annabelle E. Dunphy own the cottage upon said land, separately therefrom, and as a chattel, and are occupying the land of said The Ravenna Realty Co. unlawfully and without right. It is therefore the judgment of the court and it is ordered and decreed that the petition of said Edward V. Dunphy and Annabelle E. Dunphy be and the same is (fol. 20) denied and the temporary restraining order heretofore issued in said cause No. 85213 is hereby dissolved and held for nought, and the petition of said Edward V. Dunphy

and Annabelle E. Dunphy for quieting of title is denied.

It is further the judgment of the court and it is hereby ordered and decreed that the restraining order issued against said Edward V. Dunphy and Annabelle E. Dunphy in said cause No. 85623 be made permanent and they are hereby restrained and enjoined from making any excavation upon the land of The Ravenna Realty Co. involved herein.

All prayers of said Edward V. Dunphy and Annabelle E. Dunphy against The Ohio Edison Co. are denied. Exceptions to said Edward V. Dunphy and Annabelle E. Dunphy.

(signed) George N. Graham.

III

Opinion of The Supreme Court of The State of Ohio under case #30532, an action in Mandamus to require defendant George N. Graham, Judge, to do his mandatory duty and adjudge for petitioners which for the third time deprived these petitioners of property and rights without due process of law.

OPINION—May 8, 1946

By the Court:

The amended petition does not allege facts which entitle the relators to the extraordinary writ of mandamus against the respondent judge. Only the following brief summary of certain allegations is necessary to demonstrate that conclusion.

The present relators, as plaintiffs, brought an action against the corporations, two of the respondents here, in the Court of Common Pleas to quiet title to real estate. (fol. 67) The defendants admitted generally the allegations of the petition, but asserted that by reason of an earlier judgment ownership of the building and not of the land was in the plaintiffs. Prior to the trial in the Court of Common Pleas the plaintiffs filed

a motion for judgment on the pleadings, which was overruled. Upon trial, at the close of plaintiff's case, the court sustained defendants' motion for judgment, found plaintiffs were owners of the dwelling and defendants were owners of the land and enjoined plaintiffs from excavating or digging in the ground. Thereafter the plaintiffs filed a motion "for mandatory judgment upon the pleadings and evidence," under Section 11601, General Code, "and were again arbitrarily refused their just rights in the premises."

The amended petition prays for a writ of mandamus requiring the judge of the Court of Common Pleas to quiet the title of relators, to award damages and to decide other questions in favor of relators and against the corporations.

Section 12285, General Code, provides: "The writ may require an inferior tribunal to exercise its judgment. * * * but it cannot control judicial discretion."

The allegations of the amended petition bring it within the pronouncements of this court in State, ex rel, Cook, Supt. v. Court of Common Pleas, 144 Ohio St. 461, 59 N. E. (2nd) 376, and State, ex rel, McCamey, v. Court of Common Pleas, 141, Ohio St., 610 49 N. E. (2d) 761, which held that a writ of mandamus should not be issued to control the discretion of a court.

The relators had an adequate remedy which they could have invoked by appeal. Section 12287, General Code, provides in part that "the writ must not be issued in a case where there is a plain and adequate remedy, in the ordinary (fol. 69) course of the law." The remedy of mandamus may not be used as a substitute for appeal 25 Ohio Jurisprudence, 1013, Section 34, citing Shelby Jr. v. Hoffman 7, Ohio St., 451; State, ex. rel. Barner, v. March, Clerk, 120 Ohio St., 222, 165, N. E.; 843; and other cases.

Construing the allegations of the amended petition most favorably to the relators and treating the motions of the respondents for judgment on the pleadings as

demurrers, such demurrers are sustained, further leave to plead is refused and a writ of mandamus is denied.

Writ denied.

Weygandt, C. J., Zimmerman, Bell, Williams, Turner, Matthias and Hart, J. J., concur.

C. Jurisdiction of This Court

The grounds on which the jurisdiction of this Court is invoked are concisely stated as follows:

U. S. C. 28: 344 (b):

> It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States;* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied....

Petitioners are the lawful holders of a deed in possession of property purchased in good faith from the prior lawful owners thereof.

Said property consists of a lawfully erected dwelling house at 58 South Park Avenue, Meyers Lake, Canton, Ohio, together with a basement thereunder.

Petitioners and their predecessors in ownership exclusively paid real estate taxes thereon upon the assessed value of said dwelling or improvement.

Neither The Ravenna Realty Co. nor The Ohio Edison Co. ever owned, occupied, possessed nor paid taxes upon said dwelling nor the plat of ground around it.

Nevertheless, after petitioners had lawfully and in good faith purchased and taken exclusive possession of said improvement, The Ravenna Realty Co., as grantee of The Ohio Edison Co., demanded that petitioners pay them ground rental for the use of said plot of ground around said dwelling.

This Petitioners refused to do without there being offered some proof or explanation why such rentals should be paid.

Thereupon, The Ravenna Realty Co. brought its action in forcible entry and detainer in case No. 87668 in the Municipal Court of Canton, Stark County, Ohio to require petitioners to remove their said dwelling from the plot of ground into which its foundations had been built, and the Court found that because there had existed a custom for such rentals to be generally paid by others, that The Ravenna Realty Co. owned said plot of ground, and that by reason thereof The Ravenna Realty Co. was entitled to restitution of said plot of ground for which a writ was issued.

Petitioners then brought their action in the Common Pleas Court for Stark County, Ohio in case No. 85632 to enjoin execution of said writ, and to quiet their title against The Ravenna Realty Co. and The Ohio Edison Co. (which claimed to retain some interest in the plot of ground around petitioners' dwelling).

The Ravenna Realty Co. and The Ohio Edison Co. neither pled nor offered proof that they owned any right or title

to petitioners' dwelling or the plot of ground around it, whereas petitioners proved that they were in lawful possession thereof, and that the claimed chain of connected title of said The Ravenna Realty Co. and The Ohio Edison Co. was fictitious and fraudulent upon its face.

Having made this proof, petitioners rested their case and said respondents moved the Court George N. Graham for judgment for petitioners' failure to make a *prima facie* case. This motion was sustained and the merits of the case disposed of thereon.

Petitioners then moved the said George N. Graham, Judge, to reverse his decision by reason that upon the pleadings and evidence they were mandatorily entitled to judgment under Sec. 11601, Ohio General Code which provides in effect:

> *G. C. 11601:* When upon the pleadings or the evidence a party is entitled to judgment a court *shall* so render.

The respondent, George N. Graham, witheld making decision upon said motion until after time for perfecting an appeal upon the merits had passed—then he over-ruled said motion.

Whereupon, Petitioners brought their action in mandamus in the Supreme Court of Ohio to require said George N. Graham, Judge, to do that which he had been mandatorily required to do as a matter of law, but which he had failed and refused to do to the irrepairable damage and injury of petitioners and against which they had no other remedy in the ordinary course of law.

Petitioners twice alleged all the essential requisites to make their petition good against demurrer in said mandamus action, but the court sustained respondents' general demurrer to petitioners' first petition with leave to plead again, and sustained respondents' motion for judgment

against petitioners' second petition upon the ground that it stated no more than the first petition had stated.

Respondents' said motion was treated as a demurrer by the Court and the merits finally disposed of against these petitioners upon its said ruling.

Petitioners seek to now invoke the jurisdiction of this court from these facts upon the following grounds:

1. PETITIONERS WERE DEPRIVED OF PRIVILEGES, IMMUNITIES AND PROPERTY WITHOUT DUE PROCESS OF LAW.

Fourteenth Amendment of the United States Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of—property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Fifth Amendment of the United States Constitution:

No person . . . shall be deprived of . . . property without due process of law.

2. PETITIONERS WERE DEPRIVED OF FUNDAMENTAL AND UNIVERSAL RIGHTS WITHOUT NATURAL JUSTICE.

Article 4, United States Constitution:

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Article 6, United States Constitution:

This Constitution . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby. . . .

3. PETITIONERS WERE DENIED THEIR RETAINED RIGHTS TO USE AND OCCUPY LANDS WHICH IN THE ABSENCE OF CONTRARY PROOF WERE NEVER ACQUIRED BY RESPONDENTS NOR ANY OF THEIR PREDECESSORS IN THEIR FICTITIOUS CHAIN OF PAPER TITLE, INCLUSIVE OF THE UNITED STATES.

Ninth Amendment to the United States Constitution:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

D. Statement of the Case

Petitioners brought their action in case #30532 in the Supreme Court of Ohio to compel Respondent George N. Graham, Judge, to render judgment for them in case No. 85632 heard before him as one of the Judges of the Common Pleas Court of Stark County, Ohio.

Petitioners alleged their said action was in Equity to quiet petitioners' title to their dwelling house against The Ravenna Realty Co. and The Ohio Edison Co., corporations, which each claimed certain rights and title in and to the ground beneath and around petitioners' dwelling and petitioners alleged they had established at said trial that they had bona fidely paid valuable consideration for the lawful purchase of said dwelling from the parties who had lawfully owned and occupied it before them, and further that said corporations had no interest whatsoever in said ground and that these facts were admitted by said corporations upon the pleadings below prior to trial, and petitioners did thereupon move said George N. Graham for judgment on the pleadings, and same was overruled, and

That thereafter, upon the trial, Petitioners proved all the said allegations made in their petition and said corporations moved the said court for judgment at the close of petitioners' case without introducing or offering any evidence or testimony of any kind to establish that said corporations owned any title or right in said ground, and

That the said George N. Graham, Judge, sustained said motion and adjudged thereon against these petitioners upon the merits of said cause, and refused counsel for petitioners

his request to first make and be heard in argument thereagainst, and

That Petitioners immediately thereafter filed their written motion for judgment under authority of Ohio General Code, Sec. 11601, which provides that where a party is entitled to judgment upon the pleadings and/or the evidence, the court shall so render. Said George N. Graham, Judge, withheld making a decision thereon until after time for appeal had passed then he overruled same, and

Petitioners contended in their petition in mandamus that by reason of the failure of said corporations to prove, interpose or plead any facts sufficient to overcome their admitted rights of possession and ownership in said dwelling that they had been arbitrarily deprived of property without due process of law by said George N. Graham, Judge, and that in ruling against these petitioners upon their motion for judgment upon the pleadings and the evidence, said George N. Graham violated the duty mandatorily enjoined upon him by Sec. 11601, Ohio General Code to render in their favor in accordance with the pleadings and the evidence in said cause.

The respondents generally demurred to said petition and said demurrers were sustained with leave to plead granted to petitioners.

Whereupon, petitioners filed their Amended Petition in said cause again alleging fully the above facts and establishing therefrom that there existed a clear legal right to the relief requested, that petitioners were beneficially interested and had been damaged, that they were without other plain and adequate legal or equitable remedy in the ordinary course of law, that the action was brought to command the performance of a specific act and duty mandatorily enjoined upon George N. Graham by statutory law, and that the acts and conduct of respondent, George N. Graham, Judge, constituted a plain dereliction of duty.

Against this Amended Petition, said George N. Graham, Judge, and said corporations neither answered, demurred, nor moved within rule, but, after rule day had passed, filed their motion for judgment on the pleadings upon the theory that inasmuch as petitioners' original petition and amended petition were substantially concerned with the same set of facts that the court's ruling upon respondents' demurrer to the original petition should operate as a precedent as to the amended petition and that judgment should therefore be rendered accordingly.

Petitioners forthwith also moved for judgment on the pleadings upon the theory that inasmuch as respondents had failed to answer or demurrer within rule or otherwise interpose a proper objection or defense to petitioners' amended petition, that they were estopped from avoiding the true merit of petitioners' complaint, and that respondents were estopped by the mandatory provisions of statute from filing any dilatory pleadings after rule day without first showing good cause within the court's discretion for extending rule day.

Petitioners further argued that upon its face their amended petition was good against demurrer and constituted a proper cause in mandamus and that since respondents had neither answered nor demurred within rule as required by law, then their said motions for judgment were to be considered as their total defense under Sec. 11311, Ohio General Code and such as to require the court to adjudge for these petitioners, by reason of which a writ should forthwith issue against respondent, George N. Graham, Judge.

Upon these several motions for judgment upon the pleadings, the Ohio Supreme Court sustained the motions of respondents and overruled the motion of petitioners.

The Ohio Supreme Court found:

> The present relators, as plaintiffs, brought an action against the corporations, two of the respondents here, in the Court of Common Pleas to quiet title to real estate. The defendants admitted generally the allegations of the petition but asserted that by reason of an earlier judgment, ownership of the building and not of the land was in plaintiffs. Prior to the trial in the Court of Common Pleas, the plaintiffs filed a motion for judgment on the pleadings which was overruled. Upon trial at the close of plaintiffs' case, the court sustained defendants' motion for judgment, found plaintiffs were owners of the dwelling and defendants were owners of the land, and enjoined plaintiffs from excavating or digging in the ground. Thereafter, the plaintiffs filed a motion for "mandatory judgment upon the pleadings and evidence" under section 11601, Ohio General Code, and were again arbitrarily refused their just rights in the premises.
>
> The amended petition prays for a writ of mandamus requiring the Judge of the Common Pleas Court to quiet title of relators, to award damages and to decide other question in favor of relators and against the corporations.

In its opinion the Court held:

> Section 12285, General Code provides: "The writ may require an inferior tribunal to exercise its judgment—but it cannot control judicial discretion."
>
> The allegations of the amended petition bring it within the pronouncements of this court in State ex rel. Cook, Supt. *v.* Court of Common Pleas, 144 Ohio State, 461, 59 N. E. (2nd) 376, and State ex rel. McCamey *v.* Court of Common Pleas, 141, Ohio St., 610, 49 N. E. (2nd), 761, which held that a writ of mandamus should not be issued to control the discretion of a court.
>
> The relators had an adequate remedy which they could have invoked by appeal. Section 12287, General

Code, provides in part that "the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." The remedy of mandamus may not be used as a substitute for appeal, 25 Ohio Jurisprudence, 1013, Section 34, citing Shelby, Jr. *v.* Hoffman, 7 Ohio St., 450, State ex rel. Borner, *v.* Marsh, Clerk, 120 Ohio St., 222, 165, N. E., 843; and other cases.

Construing the allegations of the amended petition most favorably to the relators and treating the motions of the respondent for judgment on the pleadings and demurrers, such demurrers are sustained, further leave to plead is refused and a writ of mandamus is denied.

E. Assignment of Errors

In its findings of fact, the Ohio Supreme Court erred as follows:

1. Said Court gave no cognizance of the fact that in rendering upon the merits against petitioners from their petition, these petitioners were deprived of property the ownership and possession of which was not denied by respondents and contra to which respondents offered no objection or defense in said action.

2. Said court ignored the fact that petitioners' amended petition properly and fully alleged facts sufficient to constitute a good pleading in said cause, basing its final decision upon its earlier ruling against the original petition.

3. Said court ignored petitioners' motion for judgment contra to respondents' like motion, and rendered its decision exactly as if petitioners had not made such a motion.

4. Said court ignored the fact that the issue of respondents' filing pleadings after rule day had been raised by petitioners.

In its opinion the said Court erred as follows:

1. It ruled that respondent, George N. Graham was vested with discretion in the proceedings below despite the law and allegations pled in petitioners' amended petition that under section 11601, Ohio General Code, the respondent George N. Graham was mandatorily required as a matter of law and duty to adjudge in favor of petitioners and in dereliction of which duty he adjudged against them.

2. The Court erred in holding that appeal was a plain and adequate remedy in the premises.

3. The court erred in holding that petitioners could have invoked a proper remedy by appeal.

4. The court erred in finding that petitioners were in effect attempting to substitute their action in mandamus for a proceedings on appeal.

5. The court erred in not considering the allegations made by petitioners in their amended petition apart from the allegations of their original petition in passing upon the respondents' motions for judgment improperly made upon that ground.

6. The Court erred in considering respondents' said motion as a demurrer and adjudging against petitioners when same was filed after rule day and over petitioners' objection thereto without good cause for said tardy filing being first shown as mandatorily required by law shall be done.

7. The court erred in considering that the respondent, George N. Graham, was invested with such broad discretion as to be empowered to ignore the duty mandatorily imposed upon him by law to adjudge in accordance with the pleadings and the evidence.

8. In adjudging for respondents, the Court deprived these petitioners of property and rights without due process of law in the ordinary and established course

of procedure set forth by mandatory statutes relative thereto.

9. The court erred in holding that an allegation of present and lawful ownership of property is not sufficient to constitute a cause of action where no denial thereof was ever made and where, nevertheless, the said lawful owners were deprived thereof by a court below in a manner contrary to natural justice and contrary to mandatory law enjoining a duty upon said lower court to render in their favor.

10. The court erred in holding George N. Graham was invested with discretion in the premises and that petitioners could have pursued their remedy by appeal when from the face of their amended petition it was clearly alleged and established that a situation quite the opposite existed.

11. The court erred in rendering judgment upon the merits for respondents from their motion for judgment directed against petitioners' amended petition when such a remedy is only to be employed after both sides have made their pleadings and the admissions of one justifies a rendition for the other.

12. The court erred in not adjudging for petitioners upon their motion for judgment contra to petitioners' motion for judgment upon the theory that respondents' said motion constituted their entire invalid defense to petitioners' cause under statutory law and that by reason thereof amounted to an admission of petitioners' entire cause, entitling petitioners to judgment.

F. Argument

A brief summary of the points of law and fact relied upon by petitioners to sustain their contentions is given as follows:

I. Petitioners became the lawful owners and possessors of a dwelling house and basement thereunder by purchase

for valuable consideration from the prior owners and possessors thereof.

The Ravenna Realty Co. claimed to own the ground around and beneath said dwelling and basement and sought to charge Petitioners "ground rental" for the use thereof without avail.

The Ravenna Realty Co. then sought to remove plaintiffs' dwelling and basement from the plot of ground into which its foundations were built by a forcible entry and detainer action, especially provided by Ohio General Code Section 10447 for ejecting individuals and persons from premises unlawfully entered or detained by them, and not intended as a substitute for an action in Eviction which goes to the question of title.

Nevertheless said The Ravenna Realty Co., over the objection of Petitioners' counsel, did offer and introduce in evidence proof of its fraudulent paper chain of title purportedly tracing to a patent from the United States of America—and without offering or attempting to show or prove that Petitioners had ever contracted with said The Ravenna Realty Co. to pay rentals for said ground. without offering evidence that Petitioners had ever recognized their said claim of ownership or that they had ever before asseted it to Petitioners, and without establishing the validity of the abstract of title under which their said alleged claim of title appeared to originate—said The Ravenna Realty Co. was nevertheless permitted to prevail in said action upon the theory that by common knowledge that other persons situated as these Petitioners were situated paid such rentals, and that therefore these Petitioners must likewise doubtless be required to pay a similar rental, without consideration for the particular circumstances which might exist in their individual case.

The Court found from the evidence that Petitioners did own their dwelling and the basement thereunder but that

The Ravenna Realty Co. for the reasons above owned the ground around and beneath it and that therefore these Petitioners should move their said improvement off therefrom, for which purpose a writ of restitution was issued illegally against the dwelling of these petitioners, and for the execution of which said court (being of limited jurisdiction in the premises) was without power to act.

Nevertheless said writ became and constituted a cloud upon Petitioners' title to their said dwelling house and basement, and became an unlawful taking of property, without due process of law, for the reason said The Ravenna Realty Co. while admitting Petitioners owned their said property and that said The Ravenna Realty Co. had never owned the same did seek nevertheless to illegally dispossess Petitioners thereof in a manner not contemplated by established law and procedure, and were made to prevail despite conclusive evidence to the contrary in said proceedings in forcible entry and detainer and the failure of evidence in rebuttal thereof.

II. To avoid this illegal consequence and to prevent its recurrence in the future, Petitioners thereupon filed their action in Equity to enjoin execution of said writ and to quiet their title against property which from its permanent affixture to the soil had become real estate in the absence of agreement to the contrary, and because The Ohio Edison Co. had purportedly conveyed the same to The Ravenna Realty Co. by an instrument designated as a warranty deed but which upon its face was a fraud conveying nothing, these Petitioners later joined said The Ohio Edison Co. as party defendant to said action in Equity praying against them that said deed and preceding deeds be cancelled for fraud in the *factum*, and that their title be also quieted against said The Ohio Edison Co., which had in its turn acquired paper title to said premise in a like manner from its prede-

cessor and might thereafter conceivably seek to cast some similar cloud upon Petitioners' valid and true title.

Upon the trial of said Equitable Action both The Ravenna Realty Co. and The Ohio Edison Co. chose to defend in their answer only upon the ground that they were entitled to dispossess Petitioners of their said property by reason of the earlier judgment in forcible entry and detainer illegally issued against these Petitioners without due process of law as above set forth. Neither of said corporations demurred but both answered that they owned the ground beneath and around Petitioners' dwelling and basement without alleging they had in good faith or for a valuable consideration purchased same, or that they now possessed or were entitled to any right or title therein paramount to the possessive right and title of Petitioners.

Upon this state of pleadings, Petitioners moved for judgment upon the pleadings and said motion was denied and the cause thereafter assigned for trial.

Upon the trial Petitioners introduced testimony and certified copies of all pertinent instruments of transfer filed for public record affecting or purporting to affect title to their said dwelling house and basement together with their right to use the plot of ground used and occupied by their prior owners and possessors; and conclusively established therefrom under the local statute affecting the admissiblity of such certified copies and from the nature of the testimony that: (1) Petitioners had purchased from the prior owners thereof all their right, title and interest in and to the dwelling house, basement, and ground surrounding No. 58, South Park Avenue, Meyers Lake, Canton, Ohio, (2) Petitioners had immediately taken possession of said property at the time of said purchase, (3) Petitioners had received all of their said rights and title under and by virtue of a certain Quit Claim deed from their prior owners

and possessors thereof, executed simultaneously with the transfer of ownership and possession of said property.

Petitioners further conclusively proved that the deed from The Ohio Edison Co. to The Ravenna Realty Co. under which said corporations claimed to own some right or title to the ground around and beneath their dwelling was a fraud upon its face and that under law, it was inoperative to affect a transfer even had that been intended or possible, and further that any and all prior and connected deeds in the fictitious chain of fraudulent title of said corporations were void for similar reasons.

Petitioners further proved that only they and their connected predecessors in occupancy and ownership of said lands ever paid real estate taxes on said property at the value assessed for the dwelling thereon and basement thereunder, and that apart from their fraudulent paper chain of title, said corporations had no right or title therein.

Nevertheless at the conclusion of said proof said corporations moved George N. Graham, Judge, who presided at said trial for judgment for failure of these Petitioners to make their case, and said motion was sustained without proof of any kind having been offered to establish that said corporations had any interest whatsoever in the premises in question.

And in his opinion upon the case, said George N. Graham found that Petitioners' said dwelling and its connected basement were personal property belonging to Petitioners and that the ground thereunder was real estate belonging to said The Ravenna Realty Co., and said Judge restrained these Petitioners from excavating in the soil around their basement and dissolved the restraining order earlier issued against execution of the writ of restitution issued in said forcible entry and retainer action below.

Said adjudication placed these parties in the same unjust situation where they had earlier been and against which they had sought relief and affirmed the lower court's action of unlawfully taking Petitioners' property without due process of law despite the conclusive evidence and proof offered and made by Petitioners to the contrary.

III. At the conclusion of their cause heard before George N. Graham, Judge of the Stark County Ohio Common Pleas Court, these Petitioners filed their motion for judgment on the pleadings and evidence under authority of section 11601, Ohio General Code which provides that where upon the pleadings and/or the evidence a party is entitled to judgment; a court shall so render.

Petitioners filed their written brief in support of said motion arguing that from the petition and answers which alleged and admitted Petitioners exclusive ownership and title to their dwelling, and from the evidence which conclusively corroborated and established the same, and from the Court's opinion which found Petitioners to be the owners of said dwelling that it now became a matter of duty under the statute to render judgment against said corporations and for these Petitioners in all particulars prayed for.

Said George N. Graham, Judge, nevertheless did overrule said motion after reserving his decision thereon long enough to permit time for appeal upon the merits to expire.

In so conducting himself, George N. Graham did ignore and violate the mandatory duty enjoined upon him by law to grant these Petitioners the relief requested by them, and in spite of the same did divest them of their absolute property without due process of law and did arbitrarily effect a conveyance thereof without compensation to said corporations.

Said George N. Graham without allegations or proof of any kind on the part of said corporations as to their ownership of said property, did nevertheless find them to be the owners of the ground around and beneath Petitioners' dwelling and basement and to such an extent as to deprive Petitioners of the full use and enjoyment of the property which they had purchased and which even said George N. Graham had found belonged to them.

No where was it shown or offered that said corporations had acquired said lands by purchase or otherwise as against these Petitioners who are the direct successors of the original inhabitants of said lands. Nor was it shown that these Petitioners or their predecessors had ever delegated whatever rights of title and ownership therein which they held unto the United States or other agency to whom Petitioners alleged the said corporations sought to trace their fictitious paper chain of title. Whatever rights of title and ownership which were now in Petitioners were reserved by Petitioners and their predecessors in the absence of some act of specific delegation to said the United States or other agency. And for said George N. Graham, Judge, to find against Petitioners as he did was to violate the Ninth Amendment of the Constitution of the United States.

IV. After the hearing and illegal adjudication of George N. Graham against these Petitioners in said Common Pleas Court of Stark County, Ohio aforesaid, these Petitioners filed their petition in Mandamus against said George N. Graham and said corporations in the Supreme Court of Ohio alleging all the facts and events enumerated above and further alleging therein such true and essential formal matters as to make their petition in mandamus good as against demurrer.

Nevertheless, the respondents did file their general de-

murrer against said petition and same was sustained with the right granted to plead over.

Thereupon Petitioners filed their Amended Petition setting forth the same essential allegations, but in simpler language, as they had made in their original petition, Petitioners in drafting said Amended Petition were careful to include therein each of the prescribed requisites to make their pleading good against demurrer as had just been laid down as a rule by said Ohio Supreme Court in the case of *State ex rel. Stanley et al.* v. *Cook, Supt. of Banks, et al.*, being case No. 30007 in that court and decided upon March 27, 1946 and reported in Vol. 146, Ohio State Reports at page 348.

Said court laid down the following rule in that case:

1. Page: Mandamus 5.

Mandamus is an extraordinary writ and will not lie unless the relator can establish a clear legal right thereto. (Paragraph one of the syllabus of State, ex rel. Baen *v.* Yeatman, Aud., 22 Ohio St., 546; paragraph two of the syllabus 349 of State, ex rel. Papadopoulos *v.* Industrial Commission, 130 Ohio St., 77, 3 O. O. 115, paragraph one of the syllabus of State, ex rel. Skinner Engine Co. *v.* Kouri, Dir., 136 Ohio St., 343, 16 O. O. 492, and State, ex rel. Stein *v.* Department of Highways, 136 Ohio St. 252, 16 O. O. 338, approved and followed.)

2. Page: Mandamus 5.

In the absence of a showing that a relator has a beneficial interest, either as an individual, taxpayer, or as a citizen, in obtaining a peremptory writ of mandamus, such writ will not be granted. (Paragraph one of the syllabus of State, ex rel. Brophy *v.* City of Cleveland, 141 Ohio St., 518, 26 O. O. 87, and State, ex rel. Latta, Chief of Police *v.* White et al., Industrial Commission, 140 Ohio St., 197, 23 O. O. 413, approved and followed.)

3. Page: Mandamus 2.

To entitle relator to a writ of mandamus, the record must disclose affirmatively that there is no plain and adequate remedy in the ordinary course of the law. In the absence of such showing the writ will be denied. (State ex rel. First National Bank, North Baltimore, Ohio *v.* Village of Botkins, 141 Ohio St., 437, 25 O. O. 576 and Gannon *v.* Gallagher, Dir., 145 Ohio St., 170, 30 O. O. 351, approved and followed.)

4. Page: Mandamus 2.

The provision of Section 12287, General Code, that the writ of mandamus must not issue in a case where there is a plain and adequate remedy in the ordinary course of the law includes both legal and equitable remedies. (State, ex rel. Juhlman *v.* Connors, 122 Ohio St. 355, approved and followed.)

5. Page: Mandamus 2.

Where there was a plain and adequate remedy in the ordinary course of the law which the relator either resorted to and lost or neglected to take timely advantage of, a peremptory writ of mandamus will not issue. (State ex rel. Bassichis *v.* Zangerle, Aud., 126 Ohio St., 118, approved and followed.)

6. Page: Banking 27.1.

The office of the Superintendent of Banks is of statutory creation and the powers and duties of the incumbent thereof must likewise be statutory or they do not exist. (National City Bank of Cleveland, Successor Trustee *v.* Guardian Trust Co. of Cleveland, 137 Ohio St., 279, 18 O. O. 42, approved and followed.)

7. Page: Mandamus 6.

A writ of mandamus will not issue to compel the observance of law generally, but will be confined to commanding the performance of specific acts specially enjoined by law to be performed. (Cullen, Vice Mayor *v.* State, ex rel. City of Toledo, 105 Ohio St., 545; State,

ex rel. Kunick *v.* Urner, Aud., 135 Ohio St., 9, 13, O. O. 234, State, ex rel. Foster *v.* Miller et al., Tax Comm., 136 Ohio St. 295, 16, O. O. 440, State ex rel. White *v.* City of Cleveland, 132 Ohio St., 111, 7 O. O. 220, State ex rel. City Loan and Savings Co. of Wapakoneta *v.* Taggart, Recr., 133 Ohio St. 382, 11 O. O. 34, and State, ex rel. Welsh *v.* State Medical Board, 145 Ohio St., 74, 30, O. O. 287, approved and followed.)

8. Page: Mandamus 1.

In proceedings in mandamus a court (350) can not create a legal Duty. (Davis, Mayor *v.* State, ex rel. Pecsok, 130 Ohio St., 311, 5 O. O. 20, approved and followed.)

9. Page: Mandamus 3.

Where a litigant has availed himself of a plain and adequate remedy at law he will not be entitled as a relator to relitigate the same questions by means of a proceeding in mandamus. (State, ex rel. Galloway *v.* Industrial Commission, 115 Ohio St., 490; Gannon *v.* Gallagher, Dir., 145 Ohio St. 170, 30 O. O. 351, State, ex rel. Holland et al., Trustees *v.* Struble, Sheriff, 132 Ohio St. 431, 8 O. O. 281, and State, ex rel. Hess *v.* Industrial Commission, 133 Ohio St. 599, 11 O. O. 311, approved and followed.)

10. Page: Mandamus 5.

A peremptory writ of mandamus will not, in any case, be issued, unless the right of the relator thereto be clear, and the act, performance of which is desired, be one of absolute obligation on the part of the person or officer sought to be coerced; and before such writ will be allowed the relator must show not only a clear legal right to have done the specific act desires, but to have it done by the particular person or officer sought to be coerced; and a plain dereliction of duty must be established against such person or office before the writ will be awarded. (Definition of Judge Crew in State, ex rel. Gallinger *v.* Smith, Aud., 71

Ohio St., 13 38; and paragraph one of the syllabus of State, ex rel. Skinner Engine Co. *v.* Kouri, Dir., 136 Ohio St. 343, 16 O. O. 491, approved and followed.)

Petitioners' Amended Petition clearly came within all the provisions of this rule.

Respondents, George N. Graham, Judge, and said corporations neither answered nor demurred within rule, but after rule day had passed elected to test said Amended Petition by a wholly unauthorized and unprecedented procedure which would enable them to dispose of Petitioners' action in mandamus, without joining issue upon the facts or raising proper objection upon matters of law.

Said respondents in lieu of making answer or demurrer to said Amended Petition moved the court for judgment on the pleadings for the illogical reason said Amended Petition and the original Petition of these parties were concerned with the same set of facts and that inasmuch as the court had sustained Respondent's demurrer to said original petition these Petitioners were estopped from going forward upon their Amended Petition which was in fact substantially identical therewith insofar as the subject matter of the action had not been differently pled in said Amended Petition.

Petitioners filed their brief in argument against Respondents' said motion and in turn made their counter motion for judgment upon the pleadings in said cause.

Petitioners reasoned that Respondents' motions for judgment filed against their Amended Petition were not well taken because:

(1) They presumed falsely and without necessary prior inquiry that because Petitioners' Amended Petition and original Petition were concerned with the same facts that therefore they must likewise be given the same legal effect, whereas in fact if said original petition could be presumed

to actually be defective said Amended Petition was particularly drafted to cure any such defect in keeping with the Ohio Supreme Court's own recently established rule in the premises.

(2) They illogically contended that Petitioners were estopped from bringing their action in mandamus upon the theory that Petitioners had another plain and adequate remedy in perfecting an appeal from the illegal rendition of said George N. Graham, Judge. Petitioners reasoned that this contention was without merit for the reason that in rendering against them the said George N. Graham went beyond the scope of his proper judicial function (to render only after a full hearing upon both sides of the case and in accordance with the issues joined from the pleadings), and that anything done beyond this limitation in scope was extra-judicial in nature and an appeal would be without effect to show that fact, but would amount to an admission that said George N. Graham, Judge, had in fact acted within the limits of a proper judicial inquiry and had made some erroneous discretionary rulings which the appellate court could correct. This was not in fact true, and for that reason a proceedings in appeal was neither plain nor adequate under the circumstances. (Petitioners further argued that, aside from these considerations, they would have been nevertheless unable to perfect an appeal if such a remedy had been plain and adequate from the conduct of George N. Graham in withholding his ruling upon their motion for judgment until after time for appeal had passed, said conduct operating maliciously to deprive them of any such right, thereby creating a situation without a plain or adequate remedy.)

(3) Respondents' motions illogically presumed George N. Graham had been invested with discretion to rule as he did against these petitioners whereas in fact he was entirely

divested of power of discretion to so adjudge by virtue of Petitioners' motion for judgment on the pleadings and/or evidence which required him as a matter of duty under the circumstances to adjudge for these Petitioners.

(4) Petitioners further reasoned that from all the circumstances they had only one available remedy to pursue in order to procure the relief to which they were entitled, to-wit: an action in mandamus to require George N. Graham, Judge, to perform the duty enjoined upon him by law to do, but which he had failed and arbitrarily refused to do in response to Petitioners' motion to that effect.

In suport of their counter motion for judgment upon the pleadings against said Respondents filed in said action in mandamus in the Ohio Supreme Court, these Petitioners filed their written brief in argument and contended they should be made to prevail and that a writ should issue against the Respondent, George N. Graham for the following quoted reasons:

> "Code Pleadings were enacted into mandatory law by the Ohio General Assembly to insure speedy justice via the determination of issue, without the nuisance and bother of dilatory pleas.
>
> "The provisions of statute respecting rule days for filing proper pleadings is mandatory—unless for good cause *shown* (involving notice to the parties, a hearing, a finding of good cause,) the Court (*then*) in its discretion may extend rule day.
>
> "*G. C. 11346, Vol. 8:*
>
> "Rule Day for pleadings. The answer or demurrer to the petition shall be filed on or before the third Saturday, the reply or demurrer to the answer, on or before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday, after the return day of the summons or service by publication. The answer or demurrer of a defendant to an answer demanding

affirmative relief shall be filed on or before the third Saturday, the reply or demurrer thereto on (or) before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday, after such answer is filed. (R. S. 5097)

"The code defines proper pleadings as Petition—Answer—Demurrer—Cross-Petition—Reply, etc.—but nowhere in the entire chapter on code pleadings can it be found that a Motion for Judgment can be substituted by a Defendant in lieu of a required pleading, i. e. Answer—Demurrer, without first joining issue.

"G. C. Sec. 11303, Vol. 8:

"What pleadings are allowed.
"The only pleadings in civil actions are:

1. Petition.
2. Demurrer to Petition.
3. Answer, which if it demands affirmative relief may be styled a cross-petition.
4. Demurrer to answer.
5. Reply.
6. Demurrer to reply. (R. S. 5055)

"And where defendant does not make his proper pleading within rule the code penalized said defendant by deeming that all defenses and objections shall have been waived which are not inclined in defendant's Plea upon rule day.

"G. C. 11311, Vol. 8:

"Objection by Answer. When, on the face of a petition no ground of demurrer appears, the objection may be taken by answer. If the objection is not made in either way, the defendant shall be deemed to have waived it, except only that the Court has no jurisdiction of the subject of the action and that the petition does not state facts which show a cause of action. (R. S. Sec. 5063)

"*G. C. 11329, Vol. 8:*

"Every averment not controverted taken as true; exceptions. Except averments as to value, or the amount of damage, for the purposes of an action, every material allegation of a petition, not controverted by the answer, and every material allegations of new matter, in an answer not controverted by the reply, shall be taken as true. New matter alleged in a reply shall be deemed controverted by the adverse party as upon a denial or avoidance as the case may require. (R. S. Sec. 5081)

"Defendant's Motion must now be considered as Defendant's entire Answer and total defense against Relator's cause herein, for the reason same involves statements of facts made, and does not amount to a demurrer upon questions of law. It certainly cannot be taken at face value as a Motion directed to Plaintiff's Petition—for in the code there is authority for Defendant to exclusively file Answer or Demurrer within rule, and any failure to assert any and all defenses in Answer on rule day operates as an estoppel against Defendant, and vests a right to judgment in plaintiff as to all uncontroverted material allegations, except averments of damage.

"The matters complained against by Defendant are purely dilatory, and without effect as a defense.

"Under these circumstances, the Defendants' Motion must fail for the reasons the Code further provides that the Court *shall* disregard such immaterial defects in pleadings as will nevertheless allow plaintiff's Petition to stand good as against Demurrer, and if necessary may even order proper amendments to be made.

"*G. C. 11345, Vol. 8:*

"Pleadings to be liberally construed. The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties, (R. S. Sec. 5096).

"G. C. 11363, Vol. 8:

"Power of court as to amendments. Before or after judgment, in furtherance of justice and on such terms as it deems proper, the court may amend any pleadings, process, or proceeding, by adding or striking out the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or proceedings to the facts proved. When an action or proceeding fails to conform to the provisions of this title, the court may permit either to be made conformable thereto, by amendment, (R. S. Sec. 5114).

"For these statutory reasons, well known to the court and the parties herein, Plaintiff submits judgment against defendants upon all issues made from the Petition herein execpt damages should now mandatorily issue as a matter of right in favor of relators and that any remaining issues, i. e. the amount of damages actually suffered should be forthwith assigned for determination in accordance with law."

The Ohio Supreme Court sustained Relators' motion for judgment upon the erroneous grounds that respondent George N. Graham had been invested with discretion in the premises and that there had existed a plain and adequate remedy by appeal which Petitioners should have pursued, and erroneously treating said motion as a demurrer dismissed Petitioners' Amended Petition without leave to further amend.

And the Ohio Supreme Court completely ignored Petitioners' counter-motion for judgment exactly as if it had never been filed and in its opinion made no mention or disposition thereof.

Said adjudication upon the merits of said mandamus action from the pleadings filed in said action permitted Respondent corporations to prevail against Petitioners

without once at any point during the course of proceeding below having pled or proved that said Respondent corporations owned any valid or lawful right or title to Petitioners' property, and in effect affirmed each of the invalid and *ultra vires* acts of the courts below in going beyond the scope of their respective jurisdictions to find against these petitioners—and without once considering the conclusive proof of ownership of said property by Petitioners as established from the pleadings and evidence in each instance below.

In so rendering, the Ohio Supreme Court divested these Petitioners of property without due process of law or compensation for the illegal taking thereof.

V. Petitioners called these facts to the attention of The Ohio Supreme Court in a motion for reconsideration made after its rendition of said erroneous opinion, and same was denied without opinion upon the 29th day of May, 1946.

And in overruling said motion for reconsideration said court again unreasonably and erroneously affirmed its denial of due process of law to these Petitioners.

VI. In summation of argument the entire issue now before this court is one concerned with the statements of Petitioners in their uncontroverted Amended Petition filed in an action in Mandamus before the Ohio Supreme Court.

Said Amended Petition was good against demurrer in keeping with the rule established for proper pleadings by said Ohio Supreme Court.

Nevertheless said Amended Petition was erroneously dismissed as if upon a ruling on a demurrer upon Respondents' improper and unauthorized motion for judgment upon the pleadings.

And Petitioners' proper counter-motion for judgment upon the pleadings mandatorily entitling them to judgment

as prayed for was ignored by said court which as a matter of law under and by virtue of section 11601, Ohio General Code was itself required as a matter of duty to render in favor of Petitioners.

Said Section 11601, Ohio General Code provides in full as follows:

> "*When judgment rendered against verdict.* When, upon the statements in the pleadings or upon the evidence received upon the trial, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party and whether or not motion to direct a verdict may have been made, or over-ruled but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

In so rendering against these Petitioners the Ohio Supreme Court acted in a manner contrary to pertinent provisions of the Constitution of the United States so as to deprive these Petitioners of property without due process of law and so as to deny and disparage their reserved and retained rights not delegated to any government, State or Federal, by the People of The United States, to-wit:

Article XIV

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives, before mentioned, and the Members of the several State Legislatures, and all Executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Officer or public Trust under the United States.

G. Relief

Wherefore, Petitioners respectfully submit they have been deprived of inherent and natural rights and property and justice without due process of law from the illogical and illegal proceedings on the part of the Courts below and have been irreparably injured and prejudiced in a manner contrary to the highest law of the land and request that this

Court remand these proceedings back to the Ohio Supreme Court and direct that said court reverse its adjudication against these Petitioners and forthwith issue a writ in mandamus directed against Respondent, George N. Graham, Judge, requiring him to quiet Petitioners' admitted title to their dwelling house and basement and their right to use and enjoy the soil beneath and around the same against Respondent corporations, and that the fraudulent deed between said Respondent corporations as well as those others which precede it in the fictititous paper chain of title of said Respondent corporations be cancelled for fraud in the *factum* and that the Ohio Supreme Court be required to make a finding against said Respondent corporations for the damages suffered by Petitioners as a result of the adverse adjudications and the devious course of litigation into which they have been unnecessarily and inexcusably made to participate in an effort to procure their just rights in the premises.

Respectfully,

WILLIAM P. HEYNE,
Attorney for Petitioners.

(6102)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 444

EDWARD V. DUNPHY AND ANNABELLE E. DUNPHY,
Petitioners,

vs.

GEORGE N. GRAHAM, JUDGE OF THE COURT OF COMMON PLEAS FOR STARK COUNTY, OHIO AND THE OHIO EDISON COMPANY AND THE RAVENNA REALTY COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF

EDWARD V. DUNPHY,
ANNABELLE E. DUNPHY,
Pro Se.

SUPREME COURT OF THE UNITED STATES

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PETITIONER'S FINAL REPLY BRIEF

Petitioners respectfully submit they are, from Respondents' express waiver of right to file a brief, entitled to judgment and the issuance of a proper mandate herein.

The questions involved are fundamental, and go to the very roots of the traditions and ideology of the Republic.

Petitioners bona fidely purchased real estate, consisting of an improvement permanently affixed to the soil with its foundations built into the ground. At no point in the pro-

ceeding below did Respondents deny this, nor do they now deny this, nor any other of the pertinent facts alleged herein by Petitioners.

In the Courts below Respondents contended that a patent obtained and issued to them from the United States Land Office was to be given the effect of dispossessing the unalienable right of these petitioners to keep, use, and enjoy their said real estate, by reason of the fact that said patent in effect conveyed to them a Fee Simple Title in petitioners' premises.

This is clearly not so from the very nature of things of which this honorable court is enjoined to take judicial notice, to-wit:

The United States Land Office was established immediately after the Revolutionary War to provide some means for arbitrating and regulating between rival claimants for the use of land in the territory of the United States. The original thirteen States had prior to the Revolution claimed the right to regulate settlement, and after the Revolution these conflicting rights were assigned to the Republic to avoid friction between the States. But at no point in history was it even suggested or proposed that by this assignment of the right to regulate settlement that the Republic acquired Fee Simple Title.

For it is unanswerably true that the legal conception of Fee Simple Title follows only from the conquest of territories and people by a hostile power. Neither the Republic nor any of the original thirteen States can qualify as such conquerors.

If it can be assumed the Republic ever acquired a semblance of title to the lands of the territorial United States, it must have been by reason of various treaty purchases thereof from its original native Indian inhabitants. And from such a purchase the Republic could never have ac-

quired a greater claim of ownership than the native inhabitants themselves had.

The native Indian title to lands in the United States consisted of a joint right to use and occupy the soil in common with all other members of society—each individual being entitled only to whatever portion thereof he could and did actually use and occupy.

Since conquest and enslavement has never been the policy of the Republic or the Colonies the Indian Wars involving territorial disputes were merely an enforced extension of this original theory of rights in land. The Indians sought to exclude the Americans from advancing further into Indian territory. And the Americans insisted upon extending their right to settle side by side with the Indians and so acquire for themselves a measure of the benefits of the Indian conception of title to lands.

That under the proper theocratic conception of the function and purposes of the Republic it was considered this type of title to lands was an unalienable right of the People, nondelegable to any government apart from the people, is borne out in the following two great pronouncements of our forefathers:

The Declaration of Independence, July 4, 1776:

> • • • We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights,* that *among these* are Life, Liberty, and the Pursuit of Happiness. • • •

That this recitation of certain unalienable rights was not to be considered as exclusive or as limitations upon other unalienable rights reserved by the People is borne out by certain recitations later made in now historic but neverthe-

less applicable documents guaranteeing the People's Rights under the Republic.

ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT: JULY 13, 1787.

Sec. 14: It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE II

• • • No man shall be deprived of his Liberty or his property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of *rights* and *property*, it is understood and declared, that no law ought ever to be made or have force in said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

ARTICLE III

• • • The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their *property, rights,* and *liberty* they shall never be *invaded* or disturbed, unless in just and lawful wars authorized by Congress. • • •

Petitioners respectfully submit that it is nowhere recorded in history that Fee Simple Title to any of the territory of the United States was acquired by the Republic from the Indian natives by conquest in a war authorized by Congress.

The Greenville Treaty of August 3, 1795, is still the high-

est law of the Republic upon the subject of land titles in the present State of Ohio and reiterates the proposition herewith made by Petitioners. Article 4 of said treaty provides in effect that in order to perpetuate peace and display the great liberality of the United States the United States relinquishes all its Fee Simple claims to lands North of the Ohio River, East of the Mississippi River and West and South of the Great Lakes, and at another point in said treaty a boundary line is established between the territory governed by the Indians and that governed by the United States, without affecting the status or nature of the original conception of land titles jointly asserted by the Indians and the United States.

To further preserve the theocratic ideology of the Republic it was provided in all treaties entered into between the Republic and the Indians that only the United States should be vested with a right to pre-emption by purchase to claim whatever title in lands had been formerly claimed by the Indians. Since the Indian conception of title existed apart fram any conception of government, it necessarily follows that it was the kind of title asserted and intended to be protected by the Republic—namely that the title to lands in the Republic belongs to our common Creator—and that man's endowed unalienable right to use and occupy the same should never be taken from him upon the pretext that fictitious title of the nature of a Fee Simple title is sufficient to usurp the just ownership of the Creator.

To still further corroborate this reasoning herewith advanced by Petitioners the Ordinance of 1787 prohibited any State legislature from interfering with Congressional disposition and regulations for securing title to bona fide purchases, to wit:

ARTICLE IV

> • • • The legislatures of those districts, or new states, shall never interfere with the primary disposal

> of the soil by the United States in Congress assembled, *nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.* * * *

Clearly under this unalterable provision Congress has exclusive and implied power to make and provide regulations which secure the title in such soil to the bona fide purchasers, and not otherwise.

Petitioners are by admission of Respondents the bona fide purchasers, who without fraud, paid valuable consideration for their improvement to the land which by its permanent affixture thereto has now become real estate. As such they are invested with the highest and best possible kind of title available under the Republic, and their having been divested of full use and enjoyment thereof in the proceedings below they have been deprived of natural justice and denied a judicial proceedings according to the course of the common law, to wit:

THE ORDINANCE OF 1787:

ARTICLE II

> * * * The inhabitants of said territory shall always be entitled to the benefits of * * * judicial proceedings according to the course of the common law. * * *

To still further corroborate the position and support the arguments of Petitioners herein, the Constitution of the United States provides as follows:

ARTICLE IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. * * *

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. • • •

Petitioners submit in the light of the foregoing and in the light of Article VI of the Constitution which in effect ratifies and incorporates the Ordinance of 1787 and the Greenville Treaty as a part of the highest law of the Republic that their position is unanswerably sound.

Petitioners further submit the following authority:

Constitution of the United States, Article IV, Sec. 3:

• • • The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property *belonging to the United States.* • • •

Petitioners submit that the limited and only delegated authority of the United States under the Constitution is to dispose of and make regulations respecting lands owned by and belonging to the United States. Petitioners further submit that for the General Land Office to be authorized in the premises to regulate or to claim the right to dispose of petitioners' rights in real estate by the medium of a patent issued to a third party without the payment of consideration as was attempted to be done in the present case, it shall first become incumbent upon the United States to establish that it owned said lands and/or had acquired an absolute title thereto by purchase.

In this case the United States merely treated with the Indians respecting the establishment of a governmental boudary line, and ceded any claims it might have advanced upon the theory of fee simple ownership, which it might

have asserted, if it had inherited from the first English Colonists who recognized a sovereign right in regard thereto as residing in the Crown of England.

But such a conception is contrary to the theocratic ideology of our forefathers who founded the Republic under God and for that reason is as invalid today as it would have been in the early days of the Republic.

Petitioners further submit to this honorable court that upon the status of the pleadings in the courts below that they were in each instance entitled to judgment as a matter of law, from failure of Respondents to interpose or advance any valid arguments or defenses (as the Respondents are again doing in this proceedings).

And therefore it is respectfully requested that judgment be rendered against Respondents and that these Petitioners be fully restored to their property and rights and be compensated in full for their losses and damages sustained herein.

Respectfully,

WILLIAM P. HEYNE,
Counsel for Petitioners.